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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Placer)**

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CYRUS K. MESBAH et al.,

Plaintiffs and Appellants,

v.

ALI FALLAHI,

Defendant and Respondent.

C060689

(Super. Ct. No. SCV12015)

Cyrus K. Mesbah and Cathleen J. Mesbah, husband and wife (the Mesbahs), appeal on the judgment roll from a judgment that they pay defendant Ali Fallahi \$108,078 for his share of sale proceeds on some real property they once jointly owned. The Mesbahs contend that the "admitted, competent, uncontroverted and unimpeached evidence" adduced at trial does not support the factual findings incorporated into the judgment.

We shall affirm the judgment. In addition, we conclude that the appeal is frivolous because the Mesbahs' contentions indisputably have no merit. Consequently, we shall impose sanctions on the Mesbahs and their attorney.

## FACTUAL BACKGROUND

The Mesbahs have elected to proceed on a clerk's transcript (Cal. Rules of Court, rule 8.120);<sup>1</sup> thus, the appellate record does not include a reporter's transcript of the court trial that gave rise to the judgment challenged in this appeal. This is referred to as a "judgment roll" appeal. (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082-1083; *Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207.)

The parties apparently entered into a partnership for the purpose of acquiring improved real property in Placer County, to live on and eventually sell at a profit. The Mesbahs and Fallahi each owned a one-half interest in the property. They entered into a financing arrangement which required a refinance of the obligations taken at the time of purchase. For unspecified reasons, the refinancing could not be completed while the Mesbahs remained on title, so they were removed from title so that the refinancing could occur; thereafter, Fallahi refused to reconvey a half interest in the property to them.

Following disagreements, the Mesbahs initiated this action, alleging causes of action for breach of an oral contract, fraud, declaratory relief, dissolution of the parties' existing partnership, partition of real property, and for an accounting.

Following a court trial in September 2004, the court (by Judge James D. Garbolino) decided in favor of Fallahi on the

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<sup>1</sup> Further rule references are to the California Rules of Court.

Mesbahs' breach of contract and fraud causes of action, but ruled the Mesbahs own a one-half equitable interest in the property, and are entitled to be "placed back on title" to the property. The court's September 30, 2004 decision also ordered the parties' partnership dissolved, and ordered both sides to account to each other for expenses made in furtherance of the partnership objective, and for profits or proceeds attributable to their respective ownership interest in the property.

The accounting did not go smoothly. After "significant haggling" between the parties, a one-day trial on the accounting issues was set for a date in October 2005 before Judge Garbolino. When the parties requested more time, the court assigned a trial on the accounting issues to Placer County Court Commissioner Margaret E. Wells.

Commissioner Wells conducted a trial on the accounting issues over seven days between December 2005 and July 2006. No reporter's transcript of any of these proceedings appears in the record on appeal.

During the accounting trial, the parties were involved in an ongoing dispute over the sale of the property; i.e., to whom it would be sold and at what price, and the commissioner's December 22, 2006 "Decision After Trial on Accounting" notes that the purpose of the accounting was "to determine what debits and credits to attribute to each of the parties when allocating the proceeds of the sale." These issues included (as relevant on appeal) the amount owed Fallahi as a credit for the Mesbahs'

use of a portion of the property for horse pasture; whether, and in what amount, the Mesbabs still owed certain mortgage payments; and Fallahi's entitlement to reimbursement for property taxes and insurance.<sup>2</sup>

The real property at issue was sold to the Mesbabs in May 2007.

Commissioner Wells conducted a hearing in June 2007 to determine the payout of sale proceeds, at which she considered both documentary evidence and testimony; the hearing was not reported. Following additional briefing, the commissioner issued a September 7, 2007 "Order on Submitted Matter; Order to Prepare Judgment," in which she rejected the parties' "attempt to bring in additional evidence or re-argue matters that have already been decided" and made factual findings regarding the value to the Mesbabs of the property as pasture for their horses (later described as "ouster damages"), the amount in mortgage payments owed by the Mesbabs to Fallahi, Fallahi's entitlement to reimbursement for property taxes and insurance, and various other matters. At the end, Commissioner Wells found Fallahi's share of the sale proceeds to be \$141,299, and she directed the Mesbabs to prepare a final judgment, incorporating her decision

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<sup>2</sup> The Decision After Trial on Accounting incorporated the commissioner's interim findings of a year earlier, entitled "Ruling on Submitted Matter" that Fallahi is entitled to a credit for the loss of some portion of the property for pasturing the Mesbabs' horses, and the amount of such credit. The Mesbabs' request for reconsideration of the interim ruling was denied.

into Judge Garbolino's September 30, 2004 decision on the other causes of action.

The Mesbahs objected. First, they sought "corrections" to Commissioner Wells's findings, reducing the amount owed to Fallahi to either \$43,445 or \$23,445, depending on whether certain corrections were accepted. Fallahi responded, objecting to the Mesbahs' proposed corrections, but sought minor ones of his own, which also reduced his payout, but only to \$115,140.

The commissioner made only three of the proposed corrections: She modified the inadvertently misstated sales price, the payout to the mortgage holder, and a small amount owed to a third party. The commissioner rejected the parties' other arguments as attempts to "re-argue matters that have already been decided, attempt[s] to offer new evidence after evidence is closed, or relat[ing] to events or charges occurring after the matter was submitted." Her March 6, 2008 "Order on Submitted Matter; Order to Prepare Judgment" again directed the Mesbahs to prepare a final judgment, incorporating her decision into Judge Garbolino's September 30, 2004 decision on the other causes of action.

The Mesbahs balked. First, they argued that they never signed a written acceptance/waiver allowing Commissioner Wells to act as a judge pro tempore for the accounting trial, and asked the superior court to vacate her decision. In the alternative, they sought an order allowing further proceedings before Judge Garbolino on their proposed "exceptions" to the

commissioner's findings, which they argued justify a payout to Fallahi of either \$22,486 or \$41,236, depending on which of two "scenarios" the court ultimately accepts. Their various "objections and exceptions" to Commissioner Wells's final March 6, 2008 order disputed the materiality of Fallahi's testimony regarding the value of ouster; disputed Commissioner Wells's reliance on "oral testimony" of Fallahi to resolve mortgage payment amounts due Fallahi; disputed Fallahi's claim that he made unreimbursed property tax payments as he provided no documentary evidence; and disputed the commissioner's apportionment of property insurance payments.

The court rejected the Mesbahs' attempt to undermine the commissioner's findings on the accounting. The minute order of the September 3, 2008 hearing on their requests states: "The court previously took under submission the issue of the correctness of the findings of Commissioner Margaret Wells settling the account[ing] between the parties. Each of the parties has submitted documentation arguing the appropriateness of the Commissioner's findings. The court has reviewed the pleadings and the Commissioner's Report. Upon due deliberation, the court now adopts the Report of the Commissioner dated March 6, 2008[,] as its decision on the matter."

The judgment, from which the Mesbahs now appeal, was entered September 30, 2008. It incorporated "the findings of Commissioner Wells made September 7, 2007[,] with the corrections thereto made March 6, 2008," and directed the

Mesbahs to pay Fallahi the sum of \$108,078 plus accumulated bank interest from May 4, 2007, the date they purchased the property.

## **DISCUSSION**

The Mesbahs argue on appeal that the factual findings made by the commissioner and incorporated into the judgment are unsupported by “admitted, competent, uncontroverted and unimpeached evidence.” They take issue with the findings regarding amounts of certain mortgage payments by the Mesbahs, the accounting of property tax payments, and the failure to apportion the “ouster” credit.

But, given the state of the record on appeal, we cannot entertain these contentions.

### **I. The Standards of Review**

On appeal, we must presume the trial court’s judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In service of that rule, we adopt all intendments and inferences to affirm the judgment or order unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.)

It is the burden of the party challenging a judgment on appeal to provide an adequate record to assess error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) Thus, an appellant must not only present an analysis of the facts and legal authority on each point made, but must also support arguments with appropriate citations to the material facts in the record.

If he fails to do so, the argument is forfeited. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

The California Rules of Court provide an appellant with a choice of several types of records upon which to take an appeal. The choices include a reporter's transcript, a clerk's transcript, an agreed statement, and a settled statement. (Rules 8.831, 8.832, 8.834, 8.836, & 8.837.) The Mesbahs have elected to proceed with a clerk's transcript. (Rule 8.832.)

Because the Mesbahs fail to provide any reporter's transcript of the hearing preceding the judgment from which they appeal, we must treat this as an appeal "on the judgment roll." (*Allen v. Toten, supra*, 172 Cal.App.3d at pp. 1082-1083; accord, *Krueger v. Bank of America, supra*, 145 Cal.App.3d at p. 207.) Therefore, as previously noted, we "'must conclusively presume that the evidence is ample to sustain the [trial court's] findings.'" (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154.) Our review is limited to determining whether any error "appears on the face of the record." (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521; rule 8.830(b).)

## **II. The Mesbahs Cannot Show Reversible Error on Appeal**

The Mesbahs concede their contentions on appeal challenge the sufficiency of the evidence to support the commissioner's findings--thereafter incorporated into the judgment--concerning the Mesbahs' mortgage payments, the apportionment of property tax payments, and the value of the "ouster" suffered by Fallahi by virtue of the Mesbahs' use of a portion of the property for



pasturing their horses. These contentions are *not* cognizable on a judgment roll appeal.

For example, they complain that "the testimony of the Mesbahs at trial" was "entirely supported by notations on certain of the checks [for mortgage payments] which were admitted into evidence without dispute by Fallahi" but was "never reflected" in the commissioner's orders. Without a reporter's transcript of the accounting trial proceedings, we cannot ascertain the parties' testimony on any issue, much less compare it with the commissioner's factual findings to determine the extent to which they differ, and whether the findings were supported by sufficient evidence. Rather, as we note above, absent a reporter's transcript, we must presume the evidence adduced at that proceeding supports--not contravenes--all of the commissioner's factual findings, including those concerning the Mesbahs' mortgage payments, the property tax payments, and the value of the "ouster" suffered by Fallahi by virtue of the Mesbahs' use of a portion of the property for pasturing their horses. (See *Ehrler v. Ehrler*, *supra*, 126 Cal.App.3d at p. 154.)

Nor can we assess the Mesbahs' contention that the court failed to "consider" the Mesbahs' trial testimony concerning whether mortgage payment checks were properly credited, and documents concerning the tax payments that the Mesbahs' assert "were neither controverted nor impeached in any fashion." Absent evidence to the contrary, we must presume the

commissioner considered relevant evidence, and that her findings are supported by the evidence adduced at trial.

The only contention arguably arising from an alleged error that appears on the face of the record is the Mesbahs' contention that the commissioner erred in valuing the "ouster" suffered by Fallahi by virtue of the Mesbahs' use of a portion of the property for pasturing their horses, because the commissioner did "not apportion the total 'value' of the ouster based on the parties' respective ownership shares of the subject property."

"'An ouster, in the law of tenancy in common, is the wrongful dispossession or exclusion by one tenant of his cotenant or cotenants from the common property of which they are entitled to possession.' [Citation.] Whether there has been an ouster is a legal question." (*Estate of Hughes* (1992) 5 Cal.App.4th 1607, 1612.)

The commissioner's ruling on the ouster issue rejected the very argument the Mesbahs raise on appeal. It first noted that "[t]he parties referred in their testimony to [three] separate areas, and testified that from the time they acquired the property until the present, [the Mesbahs] kept [two] horses on at least one of the areas. [Fallahi] testified, and the court finds, that he asked [the Mesbahs] to remove the horses and that he [Fallahi] did not have access to the areas where the horses were kept. The court finds that defendant was effectively

excluded from a portion of his own property because of the horses being kept on the property in a fenced off area."

It then correctly rejected the notion that Fallahi was not entitled to recompense for the ouster because the Mesbahs' horses did not use more than 50 percent--their share--of the property. "[T]he law of co-tenancies is such that each party is entitled to use the entire property; neither party can legally exclude the other from any part[] of it" and "the excluded cotenant is entitled to recover the rental value of the premises from the tenant in possession." (5 Miller & Starr, Cal. Real Estate (3d ed. 2006) Holding Title, § 12:2, pp. 12-6 to 12-7 (Aug. 2006 rev.).) Fallahi testified he was told by the Mesbahs "the cost for keeping the horses would be \$150 per month, per horse"; when the Mesbahs neither denied his testimony nor offered any other evidence, the commissioner found the reasonable rental value of the land for horse-keeping to be \$300 per month for the 125 months the two horses were on the property.

The Mesbahs have cited no authority for the proposition that the commissioner used the wrong standard.

We are aware that some courts have held that, where one cotenant ousts the other in order to rent the property to a third person, the wrongfully ousted cotenant is allowed to recover only his proportional share of the rents received, not all the rents. (*Brunscher v. Reagh* (1958) 164 Cal.App.2d 174, 176-177; see also *Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 548.)

Here, however, the commissioner reported that Fallahi testified he was told by the Mesbahs that "the cost for keeping the horses would be \$150 per month, per horse," which the Mesbahs did not deny. The use of the words "would be" in the testimony summary strongly suggests that the Mesbahs were indicating at the outset that that was the amount they "would be" paying Fallahi to keep their horses on the property. And, of course, absent a reporter's transcript, we must indulge every inference to affirm the judgment. (See *Brewer v. Simpson*, *supra*, 53 Cal.2d at p. 583.) We conclude the evidence supports the commissioner's ruling that \$300 per month times 125 months represented fair compensation for Fallahi's ouster.

### **III. The Mesbahs Should Pay Sanctions to Fallahi and This Court for a Frivolous Appeal**

By separate motion, Fallahi has requested that this court impose sanctions against the Mesbahs for filing a frivolous appeal, and that they be required to pay his attorney fees of \$17,840 incurred to respond to the appeal. (Code Civ. Proc., § 907; rule 8.276.) His request is based on the grounds that the Mesbahs knew or should have known that their judgment roll appeal may not challenge the insufficiency of the evidence, and that the appeal is taken solely for the improper purposes of harassment and delay.

We calendared the matter for oral argument on the merits of the appeal and also on this court's order directing plaintiffs and their counsel to show cause why sanctions and/or attorney fees should not be imposed against them if we conclude not only

that the appeal lacks merit but that it is frivolous. (Rule 8.276(c), (d) & (e).)

Code of Civil Procedure section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." An appeal will be found frivolous when it indisputably has no merit; i.e., "when any reasonable attorney would agree that the appeal is totally and completely without merit" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650).

With respect to this case, the rule that an appeal on a clerk's transcript cannot be based on the insufficiency of the evidence has been the established law in California for decades. (E.g., *Wheelright v. County of Marin* (1970) 2 Cal.3d 448, 454; *Transportation Guarantee Co. v. Jellins* (1946) 29 Cal.2d 242, 254-255.) Any reasonable attorney would agree that such an appeal on this basis is totally and completely without merit. Here, the Mesbahs (with the assistance of counsel) attempted their appeal--which chiefly raised claims of insufficient evidence--on a clerk's transcript. An attorney who nonetheless pursues an appeal challenging the sufficiency of the evidence on a clerk's transcript alone is advancing an utterly meritless appeal.

In support of his assertion that this appeal has also been prosecuted for improper purposes of harassment and delay, Fallahi points (among other things) to the manner in which the

Mesbahs responded to Commissioner Wells's direction to prepare a judgment by challenging her assignment more than two years after the fact, and to postjudgment correspondence between the parties' counsel that Fallahi contends shows efforts by the Mesbahs and/or their attorney to obstruct payments ordered by the judgment. Courts also may consider an appellant's attempt to proceed solely on a clerk's transcript in evaluating whether the appeal was taken solely to cause delay. (*Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102.)

We find this appeal is frivolous for the reasons we indicate above. We will order the Mesbahs and their attorney to pay to Fallahi, as sanctions for a frivolous appeal, the sum of \$17,840 and, as further sanctions, to pay to this court the sum of \$2,500 to reimburse this court for the time and expense of processing the frivolous appeal. (*Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 458; *Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 312-313.) This opinion shall constitute a written statement of our reasons for imposing the aforementioned sanctions.

### **DISPOSITION**

The judgment is affirmed. As sanctions for a frivolous appeal, the Mesbahs and their attorney, William A. Clough, shall pay to Fallahi the sum of \$17,840, and to the Clerk of the Court of Appeal, Third Appellate District, the sum of \$2,500, within 15 days after the finality of this opinion. This obligation is joint and several. Attorney Clough is also ordered to report

the sanctions to the State Bar. (Bus. & Prof. Code, § 6068, subd. (o)(3).) The clerk of this court is directed to forward a copy of this opinion to the State Bar. (Bus. & Prof. Code, § 6086.7, subds. (a)(3), (c).) Respondent Fallahi shall recover his costs on appeal. (Rule 8.278(a)(1), (2).)

\_\_\_\_\_, BUTZ, J.

We concur:

\_\_\_\_\_, NICHOLSON, Acting P. J.

\_\_\_\_\_, ROBIE, J.